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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 175

PAUL TITUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM W. BARRON,
Attorney for Petitioner.

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INDEX

	PAGE
Opinions below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Questions presented	3
Statement	3
Reasons for granting writ	6
I.	
A. Geographical Discrimination in the Selection of Jurors	7
B. Refusal of Instructions	10
II. Denial of Effective Representation of Counsel	12
A. Defendant was denied due process of law and effective representation of counsel by rulings refusing to postpone trial until the September 1954 term at Syracuse and forcing the defendant to trial at Albany, notwithstanding the firm agreement of court and counsel that this be tried at Syracuse; refusing timely motions for continuance to permit adequate examination of bank records and adequate preparation for trial	12
B. The trial court erred to the prejudice of the defendant in refusing to permit the defendant to discharge his trial counsel before trial had begun, thereby depriving defendant of the effective representation of counsel of his own choosing	14
III. Other Errors	15
Conclusion	16
Appendix A—Order extending time to file petition for certiorari	17

DEC 24 1955

236703

PAGE

Appendix B—Judgment below 18

Appendix C—Opinion below 20

Appendix D—Table I
Indictments in companion cases..... 26

Appendix E—Table II
Population of Counties in Northern District of New York 29

Appendix F—Table III
Analysis of ledger controls..... 30

Appendix G—Table IV
Analysis of static periods of ledger controls..... 32

CITATIONS

Cases:

Ballard v. U. S. 329 U.S. 187, 67 S.Ct. 261, 81 L.Ed. 181 7
Commonwealth v. O'Keefe 288 Pa. 173, 148 Atl. 73 14
Coplon v. U. S. 191 F. 2d 749..... 14, 15
Newfield v. U. S., 73 App. D.C. 174, 182, 118 F. 2d 375, 383 ..... 14, 15
Powell v. Alabama 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158..... 14, 15
Thiel v. So. Pac. Co. 328 U.S. 217, 220, 66 S.Ct. 984, 90 L. Ed. 1181, 166 A.L.R. 1412..... 7
Thomas v. District of Columbia 90 F. 2d 749..... 14, 15
U. S. v. Klock, 210 F. 2d 211..... 10
U. S. v. Klock, 210 F. 2d 217..... 10
U. S. v. Gottfried, 165 F. 2d 360, 364..... 8
United States v. Titus 210 F. 2d 210..... 7

Constitutional and Statutory Provisions:

U. S. Const. 6th Amend..... 2
18 U.S.C. § 656..... 2
18 U.S.C. § 2..... 3

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PAUL TITUS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Paul Titus, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled cause entered April 26, 1955.

OPINIONS BELOW

The opinion of the Court of Appeals, 221 F 2d 571, is printed at p. 12 of this petition.

JURISDICTION

The judgment of the court below was entered April 26, 1955. (App. C. p. 20, infra) The time for filing this petition was extended to June 22, 1955 by order of Hon. John Marshal Harlan, Associate Justice of the Supreme Court of the United States entered June 25, 1955 (R. 131). App. A p. 17, infra Jurisdiction of this court is invoked under *28 U. S. C.* Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 USC § 656 provides:

> "Theft, embezzlement, or misapplication by bank officer or employee
>
> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or wilfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> "As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and 'insured bank' includes any bank, banking asso-

ciation, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation, June 25, 1948, c. 645, 62 Stat. 729."

18 USC § 2 provides:

"Principals

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such. June 25, 1948, c. 645, 62 Stat. 684."

QUESTIONS PRESENTED

1. Whether the defendant was denied the right of trial by jury as guaranteed by the Sixth Amendment. In particular whether the automatic, intentional exclusion by court rule, of all inhabitants of the county of his residence and adjacent counties is in conflict with the decisions of this Court construing that Amendment.

2. Whether the petitioner was denied a fair trial by refusal of instructions which on a former appeal the court below had held necessary.

3. Whether the petitioner was unfairly denied the effective representation of counsel by—

(a) refusal of adequate time for trial preparation, and

(b) refusal to permit the defendant to discharge counsel in whom he had lost confidence.

STATEMENT

On June 1, 1951, the Petitioner Paul Titus was charged by indictment (R 157a-161a) in the Northern District of New York with aiding and abetting one Klock, a bank bookkeeper to misapply funds of the Syracuse Trust Com-

pany and with conspiring with bookkeeper Kl k to misapply such funds.

The petitioner was twice tried at Syracuse. The jury disagreed on his first trial. On his second trial the jury acquitted him of the conspiracy charge and convicted him on the substantive counts. On appeal the United States Court of Appeals for the Second Circuit reversed that judgment. *United States* v. *Titus*, 210 F 2d 210.

Titus was tried a third time (R. 39a, 154a), this time at Albany, the State Capital, more than 150 miles distant from the home of the bank, the residence of the defendant and the residence of all the material witnesses. He filed objections to trial at Albany (R. 165a-170a), motions to postpone trial to the September, 1954 Syracuse term (R. 171a-180) in order to enable counsel and his accountant to prepare for trial. These objections were overruled and the motions denied and the defendant was forced to trial at Albany on July 1, 1954 (R. 2a).

The defendant was convicted on the substantive counts and sentenced to terms of imprisonment for a total of six years and to pay fines in the aggregate amount of $10,000. (R. 187a-188a) This judgment was affirmed by the court below April 26, 1955. (R. 193a-200a)

The defendant is at liberty on bail which was continued by the court below pending application for a writ of certiorari.

The defendant is the only depositor convicted of the offense charged although 14 other depositors were indicted for like offenses[1] and some 264 depositors were overdrawn in an amount of more than two million dollars which had not been charged to their accounts. Only one other depositor was tried. He was recently acquitted although his overdrafts exceeded $1,500,000.

At each of the first trials the government relied upon a so-called dummy control or false control of Ledger 65

[1] See Table 1 page 26 post of this petition.

as the instrument or means whereby bookkeeper Klock concealed the holdouts or overdrafts from bank officers.

Paul Titus, the Petitioner and his counsel, were unable to demonstrate the falsity of this claim until after the second trial. Upon appeal we were able to upset that contention and show conclusively that the "dummy control" of Ledger 65 could have concealed nothing from the bank officers.[2]

After the reversal of his conviction in January 1954, Petitioner assumed that he would not be tried out of order; that the case of United States v. Potter would be tried first. (R. 9a) Petitioner did not engage counsel until May 1954. (R. 15a) In the meantime the petitioner's funds had been exhausted and he was hard-put to make any defense at all. (R. 165a-180a). He was confident of his innocence; confident that Potter would be acquitted; and confident that none of the other depositors would be retried.

Potter was acquitted and it is extremely improbable that any other depositors will be convicted or even retried.

Contrary to all expectations Petitioner was forced to trial at Albany ahead of Potter and his applications for continuance for a reasonable time for trial preparation were refused. (R. 2a).

The defendant before trial had lost confidence in his counsel (R. 54a, 58a) and sought to discharge him (R. 50a-59a). Counsel properly sought to withdraw (R. 57a). Nevertheless the trial judge abruptly directed and effectively coerced the Petitioner to continue to be represented by his then counsel. (R. 57a, 58a)

When Petitioner said, (R. 57a)

> "Your Honor, if you say I have to go to trial now, then I will have to go by myself."

[2] See Table 3 Analysis of Dummy Control and Regular Control, post p. 30 reprinted from Petitioners Brief below.

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The trial judge replied—

> "Well you are not going to go by yourself. You are going to go the way I tell you."

During the trial the defendant abandoned any serious attempt to bring witnesses to Albany. He took the stand in his own defense as did his wife and he called as his witnesses one bank officer, Charles H. Wilson (R. 75a-102a) and a bank attorney, A. W. Van Hancock, (R. 104a-119a).

In his charge to the jury the trial judge refused all of defendants requested instructions (R. 142a). Many of these were vital and the Court below so held on the former appeal. United States v. Klock and Potter 210 F. 2d 211, at p. 213. These are not covered in the oral charge. They are set forth on pages 10 to 12 post of this brief.

The Court below rejected the defendant's claim that there was serious error in excluding from the petit jury all inhabitants of the 28 counties of the Northern District not residing in Albany County.

REASONS FOR GRANTING WRIT

1. The Court below has so departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the United States District Court for the Northern District of New York as to call for the exercise of this Court's power of supervision and correction, in this—

> A. The Court below has erroneously approved the uniform rule and practice of the trial court of intentionally excluding from jury service all inhabitants of the district not residing in the county where the trial is had. Thus there exists and has long existed a deliberate, intentional and calculated exclusion of almost the entire rural population of the district and the entire population of 26 of the 29 counties of the district. This contravenes the express declarations of

this Court in *Thiel* v. *Southern Pac. Co.* 328 U.S. 217, 220, 66 S.Ct. 984, 90 L.Ed. 1181, 166 A.L.R. 1412; *Ballard* v. *U. S.*, 329 U.S. 187, 192, 62 S.Ct. 261, 81 L.Ed. 181.

B. The Court below has refused to reverse the conviction of petitioner for patent errors in the refusal of instructions which on a former appeal were held essential to a fair trial.

2. The petitioner was denied due process of law and effective representation by counsel of his choice by

A. The refusal of adequate time for trial preparation;

B. The trial court's refusal to permit the petitioner to discharge his trial counsel who had lost his confidence.

I.

A. Geographical Discrimination in the Selection of Jurors.

This Court has rightly said that there must be no systematic and intentional exclusion of any geographical group in the drawing of a jury. *Thiel* v. *Southern Pac. Co.*, 328 U. S. 217, 220, 66 S. Ct. 984, 90 L. Ed. 1181, 166 A. L. R. 1412; *Ballard* v. *U. S.*, 329 U. S. 187, 67 S. Ct. 261, 81 L. Ed. 181.

In the case at bar is squarely presented the issue of whether this court really meant what it said in the *Thiel* case or whether a district court may continue to draw jury panels from a single county, city, ward or other subdivision of a district.

For forty years or more the judges of the Northern District of New York have disregarded this rule. For cases tried at Syracuse, grand and petit juries are drawn only from Onondaga County (R. 61a).[3] Similarly jurors for the Albany terms are drawn only from Albany County

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[3] See *United States* v. *Titus* 210 F 2d 210, *212*.

and for the Utica terms, only from Oneida County. Thus the defendants were tried by a petit jury from which the court intentionally excluded all inhabitants of the 28 other counties of the district.

The time has come for the courts of the United States to follow the *Thiel* case, supra, and other pronouncements to the same effect, or for this Court to disavow the principle there stated.

There is no higher function of citizenship than jury service in the Federal Courts, unless it be the bearing of arms in defense of country. It is both a duty and a privilege in which all the population of the district is entitled to share. No county, town or city should be excluded permanently. Otherwise, the excluded persons are denied a share in the civic responsibilities of citizens and the litigants are deprived of their constitutional guarantees that they shall not be tried except by a jury of the district.

The Northern District of New York contains 29 counties. (See Table 2, infra, p. 29). Its area is 28,553 square miles. Its population is 2,418,585 persons. Albany County contains 531 square miles and a population of 239,386 (1950 census; World Almanac, 1953, p. 422). Thus, the petit jury for the case at bar excluded more than 90% of the population and more than 97% of the area of the district. If the district be regarded as composed of three divisions, in which jurors are drawn only from the three counties of Onondaga, Oneida and Albany, we still have the exclusion from any federal jury service of more than 67% of the population of the District.

The court below in *United States* v. *Gottfried*, 165 F. 2d 360, 364, ruled that there was no prejudicial irregularity in drawing grand and petit jurors for the Southern District of N. Y. from the three counties of Westchester, Bronx and N. Y. In that district however, the court noted that the total population of the district (1940) was 4,400,000 and that only 550,000 lived in the excluded terri-

tory Id., p. 363. Thus 87½% of the population of the Southern District was represented on the panel and only 12½% excluded.

Whatever may be said as to the systematic exclusion of one eighth of the population of the Southern District, it can hardly be said that the exclusion of 90% of the population of the Northern District could possibly result in a representative panel.

That part of the Empire State which constitutes the Northern District of New York is not only a rich farming and dairy country but encompasses the Adirondack Mountains, famous health resorts, spas, great lakes and water courses, extensive rail, air and highway transport systems, huge manufacturing plants of every description and people of various races, creeds and political and economic beliefs.

Albany is the state capital and the home of that well known "O'Connel Gang."

Can any judge say that Albany County is typical or representative of the other 28 counties? Or that Albany, Oneida and Onondaga counties are representative of the other 26 counties? Only a great and costly research project could even approximate an intelligent answer to that question. No private litigant can afford a survey of such magnitude. Is it not inevitable that the climate of opinion on public questions will vary greatly as between University towns and industrial cities; as between farming areas and summer resorts or bathing places, and as between small and large counties? Ithaca, the county seat of Tompkins County, is the home of Cornell University. Does the population of this county (59,122) entertain the same philosophy with respect to law, crime, justice and economics as Albany County (341, 719)? The tabulations of counties in Table 2, infra, p. 4, shows that the Northern District of N. Y. contains 25 counties each containing less than 90,000 people. Of these, ten counties

have less than 50,000 inhabitants; two have less than 25,000 and one less than 5,000. All are excluded from jury service under the practice followed in the Northern District. Rensselaer County with a population of 132,607 is also excluded.

B. Refusal of Instructions.

The sole issue in the case was whether the defendant had drawn checks upon insufficient funds with intent to injure the bank, or on the contrary whether his overdrafts were honored with the knowledge of responsible bank officers and pursuant to long standing policy of the bank.

The trial court at the conclusion of its oral charge refused all of defendant's requested instructions except as covered by the oral instructions (R. 142a). Three of these requested charges are in large part those which this court on the former appeals said should have been given. *United States* v. *Klock and Potter,* 210 F. 2d 217, at p. 223. They are not covered in the oral charge. We set them out in full:

> "If you believe that the defendant Klock in his job as a bookkeeper at the Syracuse Trust Company acted in such a way as to allow depositors including the defendant Titus to draw checks when there were insufficient funds in their accounts and that his actions in this regard were reasonably guided by the policy of the bank or the instructions or approval of the officials of the bank and the bookkeeper in his subordinate position acted under the compulsion of such authority, then you may find that he was not guilty of misapplying the funds of the bank as alleged in the indictment." (R. 182a)

> "You must keep in mind that the defendant Klock was employed at the Syracuse Trust Company as a bookkeeper, which position would not warrant the making of bank policy and if he permitted or caused checks to be paid against accounts where the funds were insufficient, his acts may be construed as intend-

ing to injure the bank. However, if the payment of checks by the bank against insufficient funds was a rule rather than an exception, and a policy was in force which was condoned by officers permitting the payment of such checks against insufficient funds and that the defendant Klock acted pursuant to such policy and it is further shown that the defendant Klock had no stake in such activity, then there would be no misapplication of funds as provided by the statute." (R. 183a.)

"The indictment charges, among other things, that the defendant Klock as an employee of the Syracuse Trust Company caused the funds to be misapplied without the knowledge and consent of the bank or its officials. If you find from a fair appraisal of the evidence that the defendant Klock acted with the knowledge and approved of the bank or any officer or person authorized to give such consent or approval, then you must find that defendant Titus had no unlawful intent to injure or defraud the bank." (R. 183a)

Other requested instructions on the same issue which also were erroneously refused are set forth below.[2]

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[2] "If the bookkeeper Klock acted in keeping with instructions of his superior officers and in accordance with the policies of the bank in permitting checks to be drawn against balances containing insufficient funds (2211), then there can be no fraudulent intent of the bookkeeper and it follows that the defendant Titus could have no guilty intent to injure or defraud the bank" (R. 182a).

"A person may overdraw his account at a bank and be innocent of any evil or unlawful purpose. Overdrafts are not uncommon in banking transactions. A bank may desire to accommodate depositors and if a depositor knowingly makes an overdraft, his relations with the bank or its officials may be of such a character as to prevent the taint of criminality from attaching to the transaction. If checks were drawn against insufficient funds with the knowledge and consent of the bank, and it appears from the evidence that it was banking practice to permit it, then there would be no criminal intent" (R. 182a).

Because Klock as a bookkeeper at the Syracuse Trust Company may have been reckless and grossly negligent, you are not to presume from that fact that the defendant Titus intended to defraud the bank" (R. 182a).

"If the evidence leaves you with a reasonable doubt in your mind

(Footnote continued on following page)

The Court below in its opinion in *United States* v. *Klock*, a companion case, 210 F 2d 217, 222, 223, said:

> "These instructions (oral charge on authorization) may well have created the mistaken impression that authorization would not be a defense to an accusation of misappropriation of bank funds. In the light of these instructions, it was surely error to deny several of defendants' requested charges which would have made it clear to the jury that no crime was committed if the bank had a policy of permitting the payment of checks drawn against insufficient funds and the defendant Klock had acted pursuant to such a policy."

II.

DENIAL OF EFFECTIVE REPRESENTATION OF COUNSEL

A. Defendant was denied due process of law and effective representation of counsel by rulings refusing to postpone trial until the September 1954 term at Syracuse and forcing the defendant to trial at Albany, notwithstanding the firm agreement of court and counsel that this be tried at Syracuse; refusing timely motions for continuance to permit adequate examination of bank records and adequate preparation for trial.

On the same day, June 1, 1954, the defendant filed affidavit (R. 165a, 173a) setting forth the names of witnesses

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(Footnote continued from preceding page)

that responsible officials of the bank knew that Titus was drawing checks on a particular account which had insufficient funds and they also knew that delays were occurring before such checks were charged to his account, you shall acquit the defendant on all counts.

"Knowledge or consent of responsible officers of the bank who were not acting adversely to the interests of the bank constitutes knowledge or consent of the bank itself. To convict defendant on any of the counts you must find that bank did not know and did not consent to the checks being withheld as charges against the account of Titus" (R. 183a).

necessary for a defense; that they all resided at Auburn, New York; that each if called would testify to stated facts material to the defense; that the cost of bringing these witnesses to Albany would be prohibitive; that an examination of bank records of at least 20 days would be necessary for adequate trial preparation.

No action was taken on this motion until June 17, 1954. On that day Judge Stephen W. Brennan heard these motions (R. 12a). Additional affidavits were submitted in support of a motion to postpone the trial to a day not earlier than September 15, 1954, on the ground that adequate trial preparation could not be made in lesser time (R. 171a). The affidavit of counsel (R. 174a) made plain that counsel needed the assistance of an accountant for the examination of bank records and that an adequate examination would require not less than ten weeks. The affidavit of accountant Loomis (R. 171a) supported this motion and disclosed the magnitude of the task facing the accountant and counsel.

At the hearing, the learned trial judge assumed that the purpose of this examination was merely to trace the Titus indictment checks into the records of the bank and that it would be no such great task to trace the Titus holdout checks enumerated in the indictment (R. 23a-26a; see also R. 38a, 44a, 43a).

Judge Brennan postponed discussion on the motion for a week. On June 24, 1954, he resumed the hearing. Additional affidavits were submitted (R. 175a-180a) in which were detailed the facts which made an adequate examination of the bank records, slow and difficult. The accountant had been paid for only three days' work (R. 175a) and in that period had been unable to find the bank records which would explain how huge overdrafts could exist without regular reports to bank officers (R. 176a).

Defendant relied upon the 1951 agreement fixing the order of trial of the bank cases and that he would not be tried first. He was not notified until May 15th, 1954 that the prosecutor would move his case for trial at the Albany term beginning June 1. Defendant was without money to pay his counsel and the accountant (R. 177). His wife was willing to sell her property to defray the trial expenses, but without a postponement until September defendant would be unable to obtain the attendance of necessary witnesses in number more than twenty, whose mileage and attendance would cost more than $500 if trial was at Albany (R. 178a, 179a).

The court denied the defendant's motions and set the trial date at June 30 at Albany.

"It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." *Commonwealth* v. *O'Keefe,* 288 Pa. 173, 148 Atl. 73 cited with an approval in *Powell* v. *Alabama,* 287 U. S. 45 (1932), 53 S. Ct. 55, 77 L. Ed. 158; see also *Neufield* v. *United States,* 73 App. D. C. 174, 182, 118 F. 2d 375, 383, cert. den. 315 U. S. 798; *Coplon* v. *United States,* 191 F. 2d 749, cert. den. 342 U. S. 926 (1950); *Thomas* v. *District of Columbia,* 90 F. 2d 424.

B. The trial court erred to the prejudice of the defendant in refusing to permit the defendant to discharge his trial counsel before trial had begun, thereby depriving defendant of the effective representation of counsel of his own choosing.

Several days before the start of the trial defendant had serious disagreements with his counsel and attempted to discharge counsel (R. 57a). On the morning the trial was to begin the defendant sought a private interview with Judge Brennan. The Judge agreed to hear him in

chambers in the presence of his counsel and government attorneys (R. 50a) at which time he requested his counsel to withdraw (R. 50a-59a). Defendant had lost confidence in his counsel (R. 54a, 58a). Counsel wished to withdraw (R. 57a, R. 82), but the court, *ex mero moto,* emphatically advised defendant "to have Mr. Barron represent you" (App. 57a). When defendant insisted that if he must go to trial now he would have to represent himself. The court roughly overruled Titus and said, "Well you are not going by yourself. You are going to go the way I tell you." (R. 57a). Then, after completely cowing the defendant, the judge gave him five minutes to talk to his counsel and make up his mind what to do. Needless to say, the defendant yielded and elected to go to trial with counsel he had sought to discharge (R. 58a).

We submit that here defendant was coerced to retain counsel in whom he had lost confidence and was denied his right to discharge counsel. Therefore, he was deprived of the effective representation by counsel of his own choosing in violation of the Sixth Amendment *Powell* v. *Alabama, Neufield* v. *United States, Coplon* v. *United States, Thomas* v. *District of Columbia, supra.*

III.

OTHER ERRORS

Other trial errors apparent on the face of the record persuade that the defendant was denied a fair trial; that the trial judge did not understand the real issues.

Thus the trial judge excluded a written proposal by the bank through its attorney to extend additional credit to the petitioner at a time when he was heavily overdrawn.

Again the trial judge refused to hear objections to his charge out of the presence of the jury (R. 140a) con-

trary to Rule 30, Federal Rules of Criminal Procedure. This was embarrassing to defense counsel and obviously prejudicial to the accused.

Opportunity must be given to make the objection out of the hearing of the jury. The provision of the rule must be strictly observed. (*Lovely* v. *United States*, C. A. 4th 1948, 169 F. 2d 386.)

CONCLUSION

In the light of the record it would be a reproach to justice to permit the conviction of Petitioner to stand and allow all other depositors of the bank to go free.

For the reasons pointed out we submit that the judgment below should be reversed.

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Appendix A

Supreme Court of the United States

No. ....., October Term, 1954.

PAUL TITUS, PETITIONER

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 22, 1955.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 25th day of May, 1955.

Appendix B

United States Court of Appeals

FOR THE
SECOND CIRCUIT
United States of America

v.

Paul Titus
195

JUDGMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED APR 26, 1955
A. DANIEL FUSARO, CLERK

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of April one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK, Chief Judge,

HON. JEROME N. FRANK, Circuit Judge,

HON. CLARENCE G. GALSTON, District Judge.

United States of America,
Plaintiff-Appellee

v.

Paul Titus,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO
Clerk

Appendix C

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 195 October Term, 1954

Argued March 17, 1955 Decided April 26, 1955

Docket No. 23339

UNITED STATES OF AMERICA, APPELLEE,

v.

PAUL TITUS, APPELLANT,

BERNARD EVERETT KLOCK, LESLIE L. ROOT, JR. and PAUL TITUS, DEFENDANTS.

Before CLARK, Chief Judge, FRANK, Circuit Judge and GALSTON, District Judge.

Appeal from a judgment of conviction in the United States District Court for the Northern District of New York after trial by jury before District Judge Stephen W. Brennan. Affirmed.

Theodore F. Bowes, United States Attorney for the Northern District of New York (Robert J. Leamy, Special Assistant United States Attorney, of counsel) for appellee.

William W. Barron, for appellant.

GALSTON, District Judge.

This indictment charges conspiracy to misapply the funds of the Syracuse Trust Company, and accuses Klock, in substantive counts, of misapplying funds represented by specific enumerated checks, and accuses Titus of aiding and abetting such misapplications.

This is an appeal arising out of the third trial of Titus for this offense. On the first trial the jury disagreed. On the second trial he was found guilty, but the conviction was reversed for failure of the trial judge to submit to the jury the defense of authorization set up by Titus. See United States v. Titus, 2 Circ., 210 Fed 2d 210; United States v. Klock, 2 Circ., 210 Fed. 2d 217.

The proof in this trial of guilt seems overwhelming, but the appellant urges a number of grounds for reversal.

First it is contended that the evidence is insufficient to support the verdict.

The indictment charges, in Count 1, that Klock, one of the defendants, was a bookkeeper employed by the Trust Company; that in January, 1950, he unlawfully misapplied funds and credits of the bank in the sum of $1,200 by causing the bank to pay out, without authority, a check dated January 20, 1950, payable to the order of Reliance Distributors, Inc. in the amount of $1,200, drawn upon the account by Titus at a time when the account of Paul and/or Ann Titus contained insufficient funds to pay the check, and that repayment thereof was not in any way secured, as Klock well knew, and that he did not charge the Titus account with the amount of the check; that he concealed the check and procured no credit or refund from the transmittor; that he converted the sum of $1,200 to the benefit of Titus, and that the said sum was lost to the bank. The same count of the indictment charges that Titus unlawfully, and with intent to injure and defraud the bank, aided and abetted Klock to misapply the said funds.

Subsequent counts, 2 to 15 inclusive, are substantially similar to Count 1, except as to dates and amounts. The appellant was found guilty on all counts, 1 to 15 inclusive.

The Syracuse Trust Company was a member of the Federal Reserve, and its deposits were insured by the Federal Deposit Insurance Corporation. Titus opened his account with that bank, as he testified, in November, 1946. At that time Klock had supervision over the bookkeepers in the regular checking account division. He testified that part of his duties "were to see that each girl was doing her work correctly, looking for any difference she may have had in her daily postings, handling the holdouts from that section, and keeping that part of the department in balance."

The evidence of Titus' guilt consisted largely of testimony given by Klock, who had pleaded guilty, and by Zinsmeister, an employee of the bank who testified to conversations with Klock and to the identification of checks and records of the bank. Another witness for the Government was Heveron, a special agent of the Bureau of Investigation, who testified as to conversations that he had with the defendant Titus on April 12, 1951. Titus admitted to Heveron that on numerous occasions Klock came to the Titus store and that during those visits Klock set up certain records for Titus. Titus told the F. B. I. agent that for setting up these records he paid Klock a sum of two or three hundred dollars, and that this payment included sales which were also handled by Klock. Roth, an accountant, another special agent of the Bureau of Investigation, testified to having met Titus on April 14, 1951 at the offices of O'Connor and Shamin, attorneys for Titus. Another special agent of the Bureau of Investigation, Charles Malone, was also present. Titus admitted at this conference that his account at the Syracuse Trust Company had been overdrawn to the extent of $20,000. Roth said Titus admitted that he had talked to Klock some few days before, on April 9, 1951, to find out what to do about the outstanding checks from his account with the Syracuse Trust Company. Roth examined the books and ledger cards of the Titus account at the

bank, and testified that there was a total of $989,296.79 charged against the ledger cards, which total included the checks recovered from Klock and introduced through Zinsmeister as not having been charged to the ledger cards. It was conclusively established that $376,398.99 by way of worthless checks were drawn by Titus against insufficient funds; that these checks were paid by the bank and never debited to the Titus account.

Carlson, another F. B. I. agent, also an accountant, examined the ledger cards for the Titus account. It is not necessary to repeat in detail the evidence that he gave. It related in the main to establishing the charge in respect to the check of $1,200 recited in Count 1, and the check of $981.51 in Count 2 of the indictment. Likewise he went through the remaining counts, establishing specific proof in respect to the amounts therein charged to have been unlawfully overdrawn by Titus.

With the testimony of these witnesses the Government developed beyond the peradventure of doubt the guilt of the defendant Titus, as charged in the first fifteen counts of the indictment.

The appellant thus fails to support his contention that the evidence is insufficient to support the verdict. As to the other alleged grounds for reversal we find none controlling.

The appellant's challenge of the composition of the petit jury was in principle disposed of in the earlier appeal, United States v. Titus, 210 Fed. 2d 210, 212.

There was no error in striking from the files the defendant's affidavit seeking to disqualify Judge Foley, and certainly no prejudice resulted because this trial was before Judge Brennan, and not before Judge Foley.

The defendant had ample time within which to prepare for trial. The very able trial counsel had been in the case since 1951. Nor is the appellant's contention of any merit that he was not permitted to discharge his trial counsel before trial had begun. The opportunity was afforded the defendant by the trial judge, and the defendant on his own volition decided to retain his counsel.

The trial court did not withdraw from the jury the defense of authorization. It may be noted that Klock admitted in answer to the question, "Did any officer of the bank ever authorize you to hold out those Titus insufficient fund checks in the manner which you testified to yesterday?" that no officer had so authorized him. Then again: "Q. Did you ever tell any officer of the bank that you were holding out these Titus checks in the manner that you testified to? A. No."

Significant also is the following in the examination of Klock: "Q. Were any of these Titus checks that you had in your home or the filing cabinet on April 9, 1951 ever charged up on the Titus ledger card? A. No."

It should be observed on this question of the defense of authorization that though there was no proof given by the defendant of such authorization to Klock, nevertheless the trial judge gave the defendant the benefit of bringing it to the attention of the jury in the following part of his charge: "Now, Ladies and Gentlemen, of course if Klock had the authority of the bank official to pay checks upon, to pay these checks which are here in dispute and not to enter them in the bank records, then of course that authority would be a defense and there is no wilful misapplication. The defendant urges that you are to infer that authority. I don't believe there is any claim of any such direct authority. But it would have to be a policy. I don't recollect any particular evidence in that regard."

The objection by the appellant that the trial court acted contrary to Rule 30 of the Federal Rules of Criminal Procedure in denying the request of the appellant's counsel that his objections be taken out of the hearing of the jury, is without merit. The rule refers to objections to the charge, and counsel had, in his colloquy with the court, admitted that he was referring to requests "to the recital of the evidence." In any event, no showing of prejudice is made out by the appellant.

We conclude that the trial court committed no error in the admission or exclusion of evidence.

Affirmed.

Appendix D

TABLE I

Syracuse Trust Co. Indictments

UNITED STATES DISTRICT—NORTHERN DISTRICT OF NEW YORK

Indictments filed June 1, 1951 at Syracuse, New York

No. 30844	The United States vs. Bernard Everett Klock Leslie L. Root, Jr. Jackson M. Potter
No. 30845	The United States vs. Bernard Everett Klock Leslie L. Root, Jr. Paul Titus
No. 30846	The United States vs. Bernard Everett Klock
No. 30847	The United States vs. Bernard Everett Klock John R. Sims Lewis N. Mancino
No. 30848	The United States vs. Bernard Everett Klock H. Duane Clark Minnie A. Clark

Table I—Syracuse Trust Co. Indictments.

No. 30849	The United States vs. Bernard Everett Klock Lipsio C. Notardonato
No. 30850	The United States vs. Bernard Everett Klock Anthony R. Bersani
No. 30851	The United States vs. Bernard Everett Klock Henry A. Bersani
No. 30852	The United States vs. Bernard Everett Klock Andrew Rotondo
No. 30853	The United States vs. Bernard Everett Klock Leon S. Abramsky
No. 30854	The United States vs. Bernard Everett Klock Sherwald W. Sedgwick
No. 30855	The United States vs. Bernard Everett Klock Angelo N. Delaport

Table I—Syracuse Trust Co. Indictments.

No. 30856	The United States vs. Bernard Everett Klock Peter K. Vlassis Paul Copanas
No. 30857	The United States vs. Bernard Everett Klock Joseph B. Meyers
No. 30858	The United States vs. Bernard Everett Klock Henry Baranello

The foregoing is a true list of Indictments filed At Syracuse, New York, on June 1, 1951, with the exception of No. 30859; United States vs. Morris A. Staff.

A true copy:

ATTEST: G. A. PORTER, Clerk

By: NELLIE J. MARKS

(Seal) Deputy

Appendix E

TABLE II

Population of Counties in Northern District of New York State

1950 Census. World Almanac, 1953, Page 422.

County	*Population*	*County*	*Population*
Albany	239,386	Montgomery	59,594
Broome	184,698	Oneida	222,855
Cayuga	70,136	Onondaga	341,719
Chenango	39,138	Oswego	77,181
Clinton	53,622	Otsego	50,763
Cortland	37,158	Rensselaer	132,607
Delaware	44,420	St. Lawrence	98,897
Essex	35,086	Saratoga	74,869
Franklin	44,830	Schenectady	142,497
Fulton	51,021	Schoharie	22,703
Hamilton	4,105	Tioga	30,166
Herkimer	61,407	Tompkins	59,122
Jefferson	85,521	Warren	39,205
Lewis	22,521	Washington	47,144
Madison	46,215		

Total Population of District..... 2,418,585

Appendix F

TABLE III

Analysis of "Dummy" Control and Regular Control, Ledger 65 (Exs. 15, 16)

(Showing only 23 adjustments in "dummy" control in 2½ years and length of periods when "dummy" remained static.)

Discrepancy between "dummy" and regular control	*"Dummy" Discrepancy Static*		*Length of Static Period*
	From	*To*	
	1948		
$ 341,367.53	Oct. 20	Dec. 24	2 months
$ 505,457.26	Dec. 27	Dec. 30	2 days
$ 578,108.67	Dec. 31	Mar. 4	2 months
	1949		
$ 626,704.69	Mar. 8	Mar. 30	22 days
$ 651,704.69	Mar. 30	Apr. 26	26 days
$ 651,454.14*	Apr. 27	Apr. 28	1 day
$ 651,296.58*	Apr. 28	May 2	3 days
$ 651,801.28[1]	May 3	Sept. 29	5 months
$ 802,904.21	Sept. 30	Oct. 3	1 day
$ 860,889.88	Oct. 3	Oct. 4	1 day
$ 859,889.88*	Oct. 4	Dec. 27	3 months
$ 979,581.90	Dec. 28	Mar. 9, 1950	2 months
	1950		
$1,081,842.98[2]	Mar. 10	Aug. 30	5½ months
$1,206,930.08	Aug. 31	Sept. 28	1 month
$1,359,921.36	Sept. 29	Oct. 2	2 days
$1,354,164.48*	Oct. 2	Nov. 28	2 months
$ 738,215.88*	Nov. 29	Dec. 11	10 days
$1,216,477.23*	Dec. 12	Jan. 8, 1951	1 month

1951

$1,833,426.23	Jan. 8	Jan. 9	1 day
$1,832,425.37*	Jan. 9	Jan. 10	1 day
$1,832,425.83*	Jan. 10	Feb. 21	5 weeks
$2,140,947.05	Feb. 21	Mar. 30	5 weeks
$2,123,039.80*	Apr. 2	Apr. 6	4 days

* Indicates a figure lower than the prior highest discrepancy between the two controls unexplained in testimony unless substantial amounts of holdouts were paid before April 9, 1951 (R. 696).

[1] August 1, 1949 shows two totals, one of which is $646,801.28.

[2] From May 15 to June 16 discrepancy is $100 greater $1,081,942.98.

Appendix G

TABLE IV

Showing Checks Drawn and Paid During Certain Static Periods of "Dummy" Control of Ledger 65 (Ex. 16) Without Debiting Customers Account or Adjusting the "Dummy".

Static Period of Dummy Control	*Amount of Potter Checks in Period*	*Amount of Titus Checks in Period*
A. Oct. 20, 1948 to Dec. 15, 1948	$ 63,000	
B. Dec. 31, 1948 to March 4, 1949	$ 75,000	
C. May 3, 1949 to Sept. 29, 1949	$180,000	$ 3,500.00
D. March 10, 1950 to June 30, 1950	$ 17,000	$ 60,000.00
E. March 10, 1950 to Aug. 30, 1950	$123,000	$112,000.00

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	9
Conclusion	14

CITATIONS

Cases:

Ballard v. *United States*, 329 U.S. 187	10
Goldsby v. *United States*, 160 U.S. 70	12
Isaacs v. *United States*, 159 U.S. 487	11
Thiel v. *Southern Pacific Co.*, 328 U.S. 217	10
United States v. *Gottfried*, 165 F. 2d 360, certiorari denied, 333 U.S. 860	10
United States v. *Titus*, 210 F. 2d 210	3, 4, 9
United States v. *Klock*, 210 F. 2d 215, certiorari denied, 347 U.S. 960	4, 9
United States v. *Klock*, 210 F. 2d 217	4, 9

Statute:

28 U.S.C. 1865(a)	9

Miscellaneous:

Fed. R. Crim. P., Rule 17(b)	12

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 175

PAUL TITUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 20-25; R. 193-200)[1] is reported at 221 F. 2d 571.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1955 (R. 201; Pet. App. 18-19). On May 25, 1955, Mr. Justice Harlan ex-

[1] "R." refers to the gray printed appendix. "Tr." refers to the two-volume typewritten transcript of the trial testimony, a certified copy of which we are lodging with the Clerk of this Court.

tended the time for filing a petition for a writ of certiorari to and including June 22, 1955 (Pet. App. 17), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was unauthorized geographical discrimination in the selection for an Albany trial of petit jurors only from Albany County and not from the entire population of the Northern District of New York.

2. Whether the court properly instructed the jury on the issue of the authorization of the bookkeeper of a bank to pay overdrawn checks.

3. Whether petitioner was denied effective representation of counsel by reason of the trial court's refusal of a continuance.

STATEMENT

An indictment in 15 counts in the United States District Court for the Northern District of New York charged that Klock, a bookkeeper of the Syracuse Trust Company, misapplied funds of the bank by paying specific enumerated checks drawn upon petitioner's joint account with his wife at times when there were insufficient funds in that account, and charged that petitioner aided and abetted in such misapplications, in violation of 18 U.S.C. 656 and 18 U.S.C. 2 (R. 157-161). On the first trial, the jury disagreed; on the second trial, petitioner was found guilty, but the conviction was reversed for failure of the trial judge to

submit to the jury the defense of authorization of Klock's conduct by his superior officers in the bank. *United States* v. *Titus*, 210 F. 2d 210, 214 (C.A. 2). On the third trial, here involved, the jury found petitioner guilty on all counts (R. 143-144). He was sentenced to three years' imprisonment and a fine of $5,000 on each of counts 1 and 2, these sentences to run consecutively, and to the same prison sentence on each of the remaining thirteen counts, to run concurrently with the term under count one (R. 153, 187-188). On appeal, the judgment was unanimously affirmed (R. 201; Pet. App. 19).

The proceedings, insofar as they are relevant to issues raised in the petition for certiorari, may be summarized as follows:

1. The retrial was set for the June 1954 term of the district court at Albany, New York. Before June 1, petitioner moved for trial at Syracuse, instead of Albany, stating that 20 days would be required for his attorney, Mr. Barron, to study bank records in preparation for trial and that, since all of the witnesses resided at Syracuse or Auburn, the cost of trying the case at Albany would be prohibitive (R. 4-6, 164-172). Government counsel pointed out that petitioner had made no disclosure as to his financial situation, that a number of bank witnesses would be called by the government, and that petitioner had made no application to the court for compulsory process (R. 7, 8). The court (District Judge Foley) told Mr. Barron (R. 10): "You should know more about this case than any

man alive. You have been to the Circuit Court of Appeals, to the United States Supreme Court and two trials and not alone in the *Titus* case, but there was examination made in the *Potter* case and the *Klock* case, and it was quite substantial".[2] The court set the case for trial before District Judge Brennan on June 21, 1954 and directed that further motions be submitted to him (R. 11).

Prior to a hearing on motions before Judge Brennan on June 17, 1954, Mr. Barron moved to continue the trial to September 15, 1954, on the ground that he could not make adequate preparation of the defense in a lesser time. He filed affidavits by an accountant and himself to the effect that they would require at least 10 weeks to study necessary bank records (R. 171-174). Government counsel pointed out that the reversal in the second trial had been handed down in the last part of January; that about May 8 or 9 petitioner and his attorney had been notified that there would be a motion to set the case for trial at the June term; and that counsel had adequate time to examine such records as he deemed necessary (R. 15).

The hearing was adjourned to June 24, 1954 (R. 30). Before that date, additional affidavits were filed by petitioner, his counsel, and his accountant (R. 175-180). The court remarked that from June 9, when it granted a defense motion for

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[2] The judge was referring to *United States* v. *Titus*, 210 F. 2d 210 (C.A. 2); *United States* v. *Klock*, 210 F. 2d 215 (C.A. 2), certiorari denied, 347 U.S. 960; *United States* v. *Klock and Potter*, 210 F. 2d 217 (C.A. 2).

examination of bank documents, until June 17, no action had been taken (R. 33, 34, 1). Mr. Barron admitted that no documents which he wanted to examine had been refused by the bank (R. 38). When Mr. Barron announced that he had not been able to talk to any of petitioner's proposed witnesses, the court stated that if he had not been able to do this since May 15, the court did not know how it could do much about that (R. 45). The court denied the motion for the 10 weeks' continuance and set the case for trial at Albany on June 30 (R. 47, 49, 2).

2. On July 1, 1954, before the trial, in Judge Brennan's chambers, petitioner asserted that because of disagreements with his counsel he wanted Mr. Barron to withdraw (R. 50). The judge stated that this mere fact of disagreement did not disturb him. When petitioner mentioned apprehension that certain facts would be admitted in evidence which he thought improper, the court explained that this was a matter for decision by the trial and appellate courts (R. 51-52). Upon petitioner's complaint that his attorney had been unable to speak to a prospective witness, the court remarked: "1951 to 1954. If he has not had an opportunity, I don't know how much longer we can delay". Petitioner repeated the request that Mr. Barron withdraw, but the court stated that no reason had been given (R. 54). Mr. Barron asked permission to withdraw since petitioner stated that he had no further confidence in him (R. 57). This colloquy occurred (R. 57, 58):

The Court: * * * It seems funny on the morning that we are to go to trial, with the repeated requests for delay that we have had, we are finally met with this last one. I am very doubtful about it. I think we better go to trial.

My own advice to you, Mr. Titus, is to have Mr. Barron represent you. He must of necessity know this case. In my opinion, and I don't mean to unduly compliment anybody, he is an experienced lawyer.

[Petitioner]: Your Honor, if you say I have to go to trial now, then I will have to go by myself.

The Court: Well, you are not going to go by yourself. You are going to go the way I tell you.

* * * * *

* * * You call me and tell one minute that this case must be tried. Then less than three or four days later we are met with an application to adjourn. I know the whole story back of it. I know one minute you insist on trial in Syracuse. You appeared before me in Syracuse demanding a trial within a period of days. And the next minute you decline to be tried in Syracuse.

* * * * *

* * * I am going to be lenient but I am still going to run this court.

[Petitioner]: I want you to. I am not trying to run your court.

The Court: You started to tell me what you are going to do, and I tell you you are going to do what I tell you to do and not what you want to. I will give you five minutes to make up your mind what you want to do, and you can be excused and come—make up your mind and come back in here and put it on the record. I don't mean to keep counsel here. If you want him go and talk with him.

After petitioner returned from a conference with Mr. Barron, the following occurred (R. 58):

The Court: All right, Mr. Titus, is there any change in the situation?

[Petitioner]: I will go to trial, sir.

3. Before the trial began, petitioner's counsel moved to quash the jury panel, since the jurors were drawn entirely from Albany County with none from industrial Schenectady, with the result, according to petitioner, that laborers and wage earners other than white-collar workers were excluded. As to this, the court ruled as follows (R. 61-62):

Well it is my understanding that that is a fact, that they drew the jurors from Albany County, but you interwove in your statement something I never heard of before—certainly

there are no facts before me which indicate it at all—that laborers or a particular class of people are excluded. As far as I know there is no evidence of that at all. As far as I know, there are probably as many laborers in Albany County if not more than there are in Schenectady.

So with the understanding that that assumed statement, there is nothing but your statement, there is no proof of that fact, I will entertain and deny your motion and give you an exception.

Mr. Barron: That is all.

4. Included in the court's final charge to the jury were the following instructions:

Now, ladies and gentlemen, of course if Klock had the authority of the bank officials to pay checks upon, to pay these checks which are here in dispute and not to enter them in the bank records, then of course that authority would be a defense and there is no wilful misapplication. The [petitioner] urges that you are to infer such authority. I don't believe there is any claim of any such direct authority. But it would have to be a policy. I don't recollect any particular evidence in that regard. [R. 135.]

* * * * *

[Petitioner] contends also that the authority which he asked you to infer as given by

> the officers of Klock would inure also to his benefit, and if the checks, the overdrafts were authorized and handled in the manner as authorized by the bank, that that also would innure (*sic*) to his benefit You may say that that contention is somewhat inconsistent but the [petitioner] has a right to interpose and urge inconsistent defenses, and you are not to discard it in any manner because you conclude that in itself it is inconsistent. [R. 138.] [3]

ARGUMENT

1. Petitioner contends that since the petit jurors were drawn only from Albany County, and not from the entire population of the Northern District of New York, there was unauthorized geographical discrimination in their selection (Pet. 7-10). Similar arguments were made and rejected in *United States* v. *Titus*, 210 F. 2d 210, 212-213 (C. A. 2); *United States* v. *Klock*, 210 F. 2d 215, 216 (C. A. 2), certiorari denied, 347 U.S. 960; *United States* v. *Klock*, 210 F. 2d 217, 220 (C.A. 2).

28 U.S.C. 1865(a) provides in pertinent part: "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. * * *." Considering the extremely large area of the Northern District, the requirement is not unreasonable that jurors

[3] Petitioner's requests on this issue are set forth at Pet. 10-11.

who sit in Albany County shall all be drawn from that county. If they were drawn from the entire Northern District, totally unnecessary expenses of administration would be involved, and the jurors would be burdened with long and expensive trips from their residences.

The procedure followed does not tend to produce an unrepresentative jury as does the exclusion of persons of a particular economic level or of a particular sex or race. See *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Ballard* v. *United States*, 329 U.S. 187. Petitioner has not demonstrated that there was something peculiar to the 239,386 people in Albany County which sharply distinguished them from the total population of the Northern District, and consequently resulted in his having other than an impartial trial. Cf. *United States* v. *Gottfried*, 165 F. 2d 360, 363-365 (C.A. 2), certiorari denied, 333 U.S. 860, rehearing denied, *id.*, 883.

2. Petitioner complains of the court's refusal to give his requested instructions (R. 182, 183), the effect of which was that, if the jury found that Klock's actions were taken with the knowledge and approval of the bank officials pursuant to a bank policy, they would be required to find that there was no misapplication of funds by Klock and that petitioner had no unlawful intent to injure or defraud the bank (Pet. 10-12). As noted in the Statement, *supra*, pp. 8-9, the substance of these requests was given by the court in its own words.

The petition points to no specific part of the record showing a policy of the bank under which its officials authorized Klock to make the payments he permitted on petitioner's insufficient fund checks. To the contrary, Klock testified that he never told any bank officer that he was holding out petitioner's insufficient funds checks in the manner he had testified to; that he did this on his own responsibility; and that no bank officer authorized him to hold out such checks (Tr. 194-195, 196). If Klock obtained authorization from a bank officer to pay a check on insufficient funds, the check would be charged to the particular account and an overdraft shown in red figure, with an "O.D." symbol on it (Tr. 321, 158). None of petitioner's insufficient funds checks were ever charged in this manner (Tr. 168, 287, 289). Nor did any bank officer have authority to authorize payment of such checks, unless immediate debits were made to the customer's account (Tr. 320). Consequently, when the court submitted to the jury the defense of authorization it gave petitioner more than would appear to be his due on the present record.

3. Petitioner contends that he was denied effective representation of counsel by reason of (a) refusal of a continuance, and (b) coercing petitioner to go to trial with counsel in whom he had lost confidence (Pet. 12-15).

a. Whether a continuance should have been granted was a matter within the sound discretion of the trial court, which clearly was not abused here. Cf. *Isaacs* v. *United States,* 159 U.S. 487,

489; *Goldsby* v. *United States,* 160 U.S. 70, 72. The record discloses that petitioner and his counsel had more than ample time to prepare for trial, but attempted continuous postponements up to the date of trial. See Statement, *supra,* pp. 3-5. Petitioner had the same experienced counsel, thoroughly acquainted with the details of his case, from 1951 to 1954 (R. 10, 54), and that counsel had handled his and companion cases on appeal. This was the third trial of his case. Although the assertion was made that petitioner was financially unable to prepare for this trial, no motion was made under Rule 17(b), F. R. Crim P., providing for payment of witnesses required by indigent defendants. Petitioner's principal complaint was inadequate time for examination of bank records, yet his counsel admitted that for about eight days after an order was entered for the production of bank records nothing was done, and that he was not denied access to any bank documents (R. 33, 34, 1, 38, *supra,* pp. 4-5).

b. Nor does the record support petitioner's contention that he was forced to trial with counsel in whom he had really lost confidence, and thereby deprived of the effective representation of counsel of his own choice in violation of the Sixth Amendment. See Statement, *supra,* pp. 5-7. It is significant that petitioner delayed until the day the trial was to begin before asking that he be permitted to discharge his counsel, and that the trial court suspected that the withdrawal motion was not made in good faith (R. 55, 57-8). The court

gave petitioner every opportunity to state a valid reason for discharging counsel, but petitioner was unable or unwilling to do so (R. 54, 55). Although the judge did strongly advise petitioner that he should retain Mr. Barron by reason of his experience and intimate knowledge of the case (R. 57), he left it up to petitioner to decide what he wanted to do. When Mr. Barron and petitioner returned to the court's chambers subsequent to their private discussion, petitioner announced that he was going to trial with Mr. Barron as his attorney (R. 58, 59-60). There is no necessity to speculate on what the court's action would have been if petitioner had insisted upon discharging Mr. Barron, since the record discloses petitioner's voluntary continuation with Mr. Barron as counsel. And it should be noted that Mr. Barron represented petitioner in the Court of Appeals below (Pet. 20) and represents him here.[4]

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[4] Other alleged errors (Pet. 15-16) are plainly insubstantial. Defendant's Exhibit R, a copy of a letter of credit for petitioner, prepared by the bank's attorney for the signature of petitioner's wife, was excluded from evidence upon objection (R. 116-117). Since the letter was not signed and was never returned to the bank, its exclusion was proper.

At the conclusion of the final charge, petitioner's counsel asked that he be permitted, in the absence of the jury, to make requests "as to the recital of the evidence", and that these were not exceptions to the charge. The court did not dismiss the jury when it heard these oral requests, and petitioner made no objection to the presence of the jury (R. 140-141). Petitioner does not point out how this procedure resulted in prejudice.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
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ROBERT G. MAYSACK,
Attorneys.

JULY, 1955.

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